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No. 89-550

In The

Supreme Court of the United States

October Term, 1989

LINDA CANTRELL and husband,
JEWELL CANTRELL

Petitioners,

– vs.

ROBERT N. BUCHANAN, JR., M.D.

Respondent.

**On Petition For a Writ of Certiorari To
The Court of Appeals of Tennessee**

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Robert N. Buchanan, Jr., M.D., submits this Brief in support of his request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Tennessee Court of Appeals.

STATEMENT OF CASE

This action arises from the medical treatment rendered to the petitioner Linda Cantrell by the respondent, Dr. Robert Buchanan, Jr., on seven visits from April, 1967 through January, 1975. As part of this medical care and in compliance with the standard of care at that time, the petitioner received radiation treatments for intractable acne. In August of 1986, the petitioner was diagnosed as suffering from cancer of the thyroid. On either September 12 or September 19, 1986, the petitioner Linda Cantrell claims that she first discovered that her cancer allegedly was caused by the radiation therapy she received while under the respondent's medical care. (See page 2 of the Memorandum Opinion of the Tennessee Court of Appeals, which is included in the petitioners' Appendix at page 8a.) The petitioners filed suit against the respondent on September 11, 1987 – more than twelve years after the last medical treatment rendered by the respondent.

The respondent moved for summary judgment in the Third Circuit Court for Davidson County, Tennessee, based upon the three-year statute of repose applicable to medical malpractice cases in Tennessee, i.e., T.C.A. § 29-26-116(a)(3). This statute provides as follows:

> In no event shall any such action be brought more than three (3) years after the date on which the negligent act or omission occurred except where there is fraudulent concealment on the part of the defendant in which case the action shall be commenced within one (1) year after discovery that the cause of action exists. T.C.A. § 29-26-116(a)(3).

The trial court agreed with the respondent that the three (3) year statute of repose barred the petitioners' cause of action. Accordingly, the trial court granted the respondent's Motion for summary judgment. The judgment of the trial court was subsequently affirmed by the Tennessee Court of Appeals. The petitioners then filed an Application with the Tennessee Supreme Court for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. On June 5, 1989, the Tennessee Supreme Court denied the petitioners' Application for Permission to Appeal. The petitioners then filed this Petition for Writ of Certiorari.

The petitioners' main challenge in this case concerns the constitutionality of the Tennessee three-year statute of repose for medical malpractice cases, i.e., T.C.A. § 29-26-116(a)(3). Specifically, the petitioners now allege that this statute denies them of a property right without due process of law. The petitioners failed to raise this issue, however, in the trial court. Indeed, as the petitioners themselves acknowledge at Page 5 of their Petition for Writ of Certiorari, the present constitutional challenge to T.C.A. § 29-26-116(a)(3) was not raised until the oral argument before the Tennessee Court of Appeals.

SUMMARY OF ARGUMENT

The petitioners failed to raise their present constitutional challenge to T.C.A. § 29-26-116 (the three-year statute of repose for medical malpractice actions in Tennessee) at the state trial court. Moreover, the petitioners have failed to show that the Tennessee Supreme Court ever considered the petitioners' constitutional attack on the statute. On the contrary, the Order issued by the Tennessee Supreme Court in this case recites merely that the petitioners' Application for Permission to Appeal is denied. No reference is made to the constitutional issue now raised by the petitioners. As this Court has stated in its previous rulings, when the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show to the contrary. The petitioners have failed to make such an affirmative showing in the instant case.

The respondent further submits that the three-year statute of repose involved in this case (T.C.A. § 29-26-116) is not violative of the petitioners' due process rights. The constitutionality of the statute has been upheld by the Tennessee courts. As applied to the facts of the instant case, the three-year statute of repose merely served to bar a cause of action which had not yet accrued or vested. Accordingly, the statute did not deprive the petitioners of a vested property right.

Based on all of the above, the respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

ARGUMENT

I. THE PETITIONERS FAILED TO RAISE THEIR PRESENT CONSTITUTIONAL ATTACK ON T.C.A. § 29-26-116(a)(3) AT THE TRIAL COURT LEVEL. AS A RESULT, THE TENNESSEE SUPREME COURT DID NOT RULE UPON THE ISSUE.

The petitioners assert in their Petition for Writ of Certiorari that the important question of law involved in this case is whether T.C.A. § 29-26-116 of the Tennessee Medical Malpractice Review Board and Claims Act of 1975 violates the due process rights of the petitioner, Linda Cantrell, by barring her medical malpractice claim before her cause of action ever accrued. This issue was not raised by the petitioners, however, at the trial court level. The Tennessee Attorney General's Office was not notified of a constitutional challenge to the statute as required by Rule 24.04 of the Tennessee Rules of Civil Procedure, Rule 32 of the Tennessee Rules of Appellate Procedure, and Rule 28.4(c) of the Rules of the Supreme Court of the United States.

The first time the petitioners raised their present challenge to the constitutionality of T.C.A. § 29-26-116(a)(3) was during the oral argument before the Court of Appeals. Indeed, this fact is acknowledged by the petitioners on page 5 of their Petition for Writ of Certiorari. Moreover, the petitioners have not established that their constitutional challenge to T.C.A. § 29-26-116 was considered by the Supreme Court of the State of Tennessee.

The petitioners have failed to satisfy the clearly-established requirement of showing that the constitutional issue was properly presented to the highest state

court for consideration. *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S.Ct. 682, 92 L.Ed. 863 (1948). The importance of this requirement has been set forth as follows:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of the constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though states are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them. *Cardinale v. State of Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969).

When the highest state court has failed to pass upon a federal question, as in the instant case, it will be assumed that the omission was due to want of proper presentation in the state courts, *unless the aggrieved party can affirmatively show the contrary. Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S.Ct. 2296, 76 L.Ed.2d 497, 504 (1983). The case of *Exxon Corp. v. Eagerton*, supra, is similar to the instant case in that the appellants failed to raise their federal preemption challenge to a state statute in the trial court. Although the appellants addressed this issue in their Brief before the Alabama Supreme Court, that Court did not pass on the issue. In ruling that it had no jurisdiction to consider the preemption issue, this Court stated as follows:

> . . . Nor does anything in the record before us indicate that this issue was raised in the trial

> court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama, but that court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA preempted the application of the pass-through prohibition to oil, for it does not affirmatively appear that the issue was decided below. The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S.Ct. 2296, 76 L.Ed.2d 497, 504 (1983) (citations omitted).

The Tennessee appellate courts follow the same, well established rule, and refuse to pass upon any question raised for the first time on appeal. *Shelton v. Martin*, 180 Tenn. 454, 176 S.W.2d 247 (1943). As a general rule, the Tennessee courts will not even consider on rehearing that which was not at issue in the original hearing. *Nashville v. Wilson*, 88 Tenn. 407, 12 S.W. 1082 (1848).

More recently, in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978), the Tennessee Supreme Court was presented with the same issue under nearly identical circumstances. Indeed, the appellants' particular challenge in *Harrison v. Schrader* involved the exact question as is involved in the instant case, i.e., whether the three-year statute of repose of T.C.A. § 29-26-116 could be applied retroactively, consistent with due process, to foreclose appellants' cause of action before it ever accrued. The Tennessee Supreme Court noted, however, that the appellants' challenge to the retroactive application of the statute had not been raised in the trial court. *Harrison v. Schrader*, 569 S.W.2d at 828. In refusing to consider the appellants' new challenge to the statute made for the first time on appeal, the Tennessee Supreme Court stated as follows:

> . . . Counsel may not be heard, at this late date, to revive this action by the injection of a new and different issue.
>
> . . . In civil cases, this Court will not, as a general rule, pass upon any question raised for the first time on appeal. Nor will we consider on rehearing that which was not at issue in the original hearing. *Harrison v. Schrader*, 569 S.W.2d at 828 (citations omitted).

As in *Harrison v. Schrader*, supra, the petitioners' failure in the instant case to raise their constitutional challenge to T.C.A. § 29-26-116 at the trial court level should result in this Court's refusal to consider the issue. The respondent submits that the petitioners should not, at this late date, be allowed to unduly prolong this matter by the injection of a new and different issue.

II. TENNESSEE COURTS HAVE UPHELD THE CONSTITUTIONALITY OF T.C.A. § 29-26-116 IN PREVIOUS RULINGS.

The Tennessee Supreme Court upheld the constitutionality of T.C.A. § 29-26-116 in *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978). Significantly, the facts involved in *Harrison v. Schrader* are quite similar to the facts involved in the instant case. In *Harrison v. Schrader*, a vasectomy was performed upon the petitioner in an allegedly negligent fashion in 1972. On July 1, 1975, the Medical Malpractice Review Board and Claims Act of 1975, including the three-year statute of repose which is the subject of the instant action, became effective. Shortly after learning on December 18, 1975 that his wife was pregnant, the petitioner Harrison consulted a second

physician and learned that his vasectomy had been performed in a negligent fashion. He then filed suit against the doctor involved on September 22, 1976.

Based on the three-year statute of repose in what is now T.C.A. § 29-26-116(a)(3), the defendant doctor in *Harrison v. Schrader* moved to dismiss on the ground that the action was filed more than three years after the alleged negligent act or omission and was, therefore, time barred. The trial court granted the Motion and dismissed the action. *Harrison v. Schrader*, 596 S.W.2d at 824.

On appeal, the Tennessee Supreme Court specifically upheld the constitutionality of the three-year statute of repose. In doing so, the Court recognized that at the time the Medical Malpractice Review Board and Claims Act of 1975 was passed, " . . . this State and the Nation were in the throes of what was popularly described as a 'medical malpractice insurance crisis'." *Harrison v. Schrader*, 569 S.W.2d at 826. In addition, the Court noted:

> . . . it is understandable that a legislature intent upon halting such phenomenal increases would seek some method to increase the certainty of such estimates, i.e., an absolute three-year limit on the time within which actions could be brought. *Harrison v. Schrader*, 569 S.W.2d at 826.

In upholding the constitutionality of the statute in question, the Court stated that "there was indubitably a valid reason for the distinction made by the statute." *Harrison v. Schrader*, 569 S.W.2d at 827.

In *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d 816 (Tenn. App. 1979), the Tennessee Court of Appeals was faced with the identical issue involved in the instant case. The alleged negligent act

involved in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, (i.e, the failure of a doctor to recognize that a microscopically-examined specimen was malignant) occurred on June 2, 1970. As noted above, the Medical Malpractice Review Board and Claims Act of 1975 became effective on July 1, 1975. On January 13, 1976, the patient learned of the existence of malignancies in her lungs and brain. She died on May 31, 1976, and suit was filed against the doctor on January 7, 1977.

The Court in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, held that although the negligent act occurred on June 2, 1970, the patient's cause of action did not *accrue* until January 13, 1976 – the date she discovered the existence of the malignancies. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 819. Pursuant to the three-year statute of repose, however, she could not bring a lawsuit after June 2, 1973 – three years after the alleged negligent act. Accordingly, the three-year limitation contained in the statute of repose expired prior to the accrual of the cause of action.

The Court in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, further stated that although a statute of limitation may not be given retrospective application so as to bar an *accrued* right of action, it *may* bar, consistent with due process, a cause of action which has not yet accrued or vested. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 820. Since the cause of action does not accrue in Tennessee until the discovery of the injury, *see Teeters v. Currey*, 518 S.W.2d 512 (Tenn. 1974), the plaintiff's alleged cause of action in *Jones v. Morristown-Hamblen Hospital Association, Inc.* did not accrue until after the three-year limitation period

contained in the statute of repose had expired. In light of the fact that the plaintiff did not have an accrued cause of action at the time the statute expired, the Court held that the three-year limitation period contained in the Tennessee statute of repose applied to the action and barred the lawsuit. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 821. Moreover, the Tennessee Court of Appeals stated that the retrospective application of the statute of repose constituted the clear intent of the legislature in enacting the Medical Malpractice Review Board and Claims Act. *Jones v. Morristown-Hamblen Hospital Association, Inc.*, 595 S.W.2d at 821.

As in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, the petitioner Linda Cantrell's cause of action in the instant case did not accrue until after the expiration of the three-year statute of repose. That is, her cause of action did not accrue until September of 1986 – the date she claims to have discovered that her cancer allegedly was caused by the radiation therapy she received while under the respondent's medical care. The last medical treatment rendered by the respondent, however, was in January of 1975. This means that the three-year statute of repose expired in January of 1978. Since the petitioner's cause of action had not yet accrued when the three-year statute of repose expired in January of 1978, there is no due process violation. As in *Jones v. Morristown-Hamblen Hospital Association, Inc.*, supra, the three-year statute of repose in the instant case merely served to bar a cause of action which had not yet accrued or vested.

In light of the fact that the three-year statute of repose, as applied in the instant case, barred a cause of

action which had not yet accrued or vested, the respondent respectfully submits that the petitioners' Petition for a Writ of Certiorari should be denied. The petitioner Linda Cantrell simply did not have a vested property right at the time the statute of repose expired. Under such circumstances, there is no due process violation.

CONCLUSION

The petitioners failed to raise their present challenge to T.C.A. § 29-26-116(a)(3) at the trial court level. They should not be allowed the opportunity to raise the issue concerning the constitutionality of the statute for the first time on appeal.

The petitioners have failed to establish that their constitutional challenge to T.C.A. § 29-26-116(a)(3) was properly presented and considered by the Tennessee Supreme Court. Indeed, the Tennessee Supreme Court made no reference to any constitutional issues in denying the petitioners' Application for Permission to Appeal. When the highest state court has failed to pass upon a federal question, it is assumed that the omission was due to want of proper presentation in the state courts. Significantly, the aggrieved party has the affirmative burden to show to the contrary. The petitioners failed to carry this burden in the instant case.

Even if the petitioners had properly raised their challenge to T.C.A. § 29-26-116 in the trial court, the respondent submits that the petitioners' Petition for Writ of Certiorari should be denied due to the lack of a due process defect in the statute. Furthermore, the Tennessee

courts have upheld the constitutionality of the statute in previous rulings. As the Tennessee Supreme Court pointed out in *Harrison v. Schrader*, supra, in upholding the constitutionality of the three-year statute of repose contained in T.C.A. § 29-26-116(a)(3):

> Undeniably some hardship results from the application of this statute, but it is not the role of this Court to pass upon the wisdom or lack thereof of the legislation under review. In the absence of constitutional infirmity such matters are ones of policy solely for the legislature. *Harrison v. Schrader*, 569 S.W.2d at 828.

Based on all of the above, the respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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